



No. **75-1643**

In the Supreme Court of the United States

OCTOBER TERM, 1975

F. DAVID MATHEWS, SECRETARY OF HEALTH,
EDUCATION, AND WELFARE, APPELLANT

v.

GEORGE ABBOTT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OHIO

JURISDICTIONAL STATEMENT

ROBERT H. BORK,

*Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

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OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 5-9) is not yet reported.

JURISDICTION

The judgment of the district court (App. B, *infra*, pp. 10-11) entering judgment for the payment of husband's insurance benefits, on the ground that portions of 42 U.S.C. 402 are unconstitutional, was entered on February 13, 1976. A notice of appeal to this Court (App. C, *infra*, pp. 12-13) was filed March 12, 1976. The jurisdiction of this Court is conferred by 28

U.S.C. 1252. *Weinberger v. Salfi*, 422 U.S. 749, 763 n. 8.

QUESTION PRESENTED

Whether Section 202(c) of the Social Security Act invidiously discriminates by conditioning the payment of husband's insurance benefits upon a showing that the husband was dependent on his wife for more than half his support, whereas wife's insurance benefits are payable without any such showing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall be * * * deprived of * * *

property, without due process of law * * *.

Section 202(c) and (f) of the Social Security Act, 49 Stat. 623, as amended, 42 U.S.C. 402(c) and (f), is set forth in App. D, *infra*, pp. 14-15.

STATEMENT

Appellee George Abbott applied to the Social Security Administration for husband's insurance benefits pursuant to Section 202(c) of the Social Security Act, 42 U.S.C. 402(c). His application was denied because he failed to establish, as required by Section 202(c)(1)(C), that he had been "receiving at least one-half of his support * * * [from his wife at the time she became entitled to old-age benefits]." ¹

¹ The other conditions of eligibility for husband's insurance benefits are set forth in Section 202(c)(1)(A) to (D). The husband must have attained age 62 and must not be entitled to old-age

Mr. Abbott and his wife then jointly filed a class action for declaratory and injunctive relief in the United States District Court for the Northern District of Ohio, alleging that the dependency provision of Section 202(c)(1)(C) was unconstitutionally discriminatory in that no similar showing of dependency is required as a condition of eligibility for wife's insurance benefits. A three-judge court was convened pursuant to 28 U.S.C. 2282, but was later dissolved for want of jurisdiction to enter injunctive relief on the basis of the Court's decision in *Weinberger v. Salfi*, 422 U.S. 749, and the action was returned for consideration by a single-judge district court. That court held that under *Salfi* it lacked jurisdiction to grant class relief.² It declared the dependency provision unconstitutional, however, under *Weinberger v. Wiesenfeld*, 420 U.S. 636³ and directed the Secretary of Health, Education, and Welfare to begin payment of husband's insurance benefits to Mr. Abbott (App. A, *infra*).⁴

or disability insurance benefits equal to or in excess of one-half of his wife's primary insurance amount. 42 U.S.C. 402(c)(1)(A), (B), and (D).

² Appellees have cross-appealed from that portion of the district court's order denying class relief.

³ The district court relied upon the decisions in *Jablon v. Secretary of Health, Education, and Welfare*, 399 F. Supp. 118 (D. Md.), direct appeal pending, No. 75-739; *Silbowitz v. Secretary of Health, Education, and Welfare*, 397 F. Supp. 862 (S.D. Fla.), direct appeal pending, No. 75-712; *Coffin v. Secretary of Health, Education, and Welfare*, 400 F. Supp. 953 (D. D.C.), direct appeal pending, No. 75-791; and *Goldfarb v. Secretary of Health, Education, and Welfare*, 396 F. Supp. 308 (E.D. N.Y.), probable jurisdiction noted, February 23, 1976, No. 75-699 (App. A, *infra*, p. 7).

⁴ The court found it unnecessary to reach Mrs. Abbott's claim that the dependency provisions invidiously discriminated against

THE QUESTION IS SUBSTANTIAL

This case, like *Mathews v. Silbowitz*, No. 75-712, and *Mathews v. Jablon*, No. 75-739, presents, in the context of husband's insurance benefits under Section 202(c) of the Social Security Act, 42 U.S.C. 402(c), the same constitutional question presented by *Mathews v. Goldfarb*, No. 75-699, probable jurisdiction noted, February 23, 1976, in the context of widower's insurance benefits: whether Section 202 of the Act invidiously discriminates by conditioning the payment of men's retirement-age dependency benefits upon a showing of actual dependency upon their wives, whereas similar benefits are payable to certain women of retirement age without a similar showing of actual dependency.⁵ The considerations that bear upon the constitutionality of the dependency provisions appear to be identical in each case.

CONCLUSION

This case should be held pending disposition of *Mathews v. Goldfarb*, *supra*.⁶

Respectfully submitted.

ROBERT H. BORK,
Solicitor General

MAY 1976.

female wage earners by providing them with lesser insurance than male wage earners.

⁵ This question also arises in *Mathews v. Coffin*, No. 75-791.

⁶ A copy of our jurisdictional statement in *Goldfarb* is being furnished to counsel for the appellees.

APPENDIX A

FILED FEB. 12, 1976

*In the United States District Court for the Northern
District of Ohio Western Division*

CIVIL NO. C 74-194

GEORGE AND MILDRED ABBOTT, PLAINTIFFS,
vs.

CASPAR WEINBERGER, SECRETARY HEALTH, EDUCATION
AND WELFARE, DEFENDANT.

OPINION AND ORDER

YOUNG, J:

This cause came to be heard upon several motions filed by the parties. Plaintiffs allege that a federal statute, (42 U.S.C. § 402(c), § 202(c) of the Social Security Act) and particularly 42 U.S.C. § 402(c) (1)(C) denies them equal protection of the law because husbands must prove they receive one-half of their support from their wives, while wives need not prove such support in order to collect dependency benefits. Plaintiffs seek declaratory and injunctive relief as well as an order granting them the benefits they allege are due them under the Act. A three-judge court was originally convened to hear this case. However, by an order filed November 21, 1975, the three-judge court was dissolved and the matter will proceed before this Court sitting alone. This case has been conditionally certified as a class action and the defendant has moved to revoke the

class or, in the alternative, to alter or modify it. Defendant has also moved to dismiss Mildred Abbott as a party plaintiff in this action. Plaintiffs have moved to allow the appearance and practice by law students. Both sides have moved for summary judgment pursuant to Rule 56 Fed. R. Civ. P. and there being no dispute as to any material fact, this case is in a proper position to be so decided.

The first matter to be taken up by the Court will be plaintiffs' motion for appearance and practice by law students. Since the requirements of Rule 2(H) L. Civ. R. have been met and since the defendant has not objected to the motion, the appearance and practice by law students will be permitted.

Defendant has moved to revoke the conditional certification of the nationwide class or, in the alternative, to alter or modify it. The class as conditionally certified consists of:

All present and future dependent husbands of retired female wage earners entitled to Social Security benefits under 42 U.S.C. § 402(c), said dependent husbands being unable to prove that at least one-half of their support was supplied by their wives, and who have been or will be denied benefits for that reason.

This Court is compelled by the Supreme Court decision of *Weinberger v. Salfi*, 95 S.Ct. 2457 (1975) to find that the members of the class have not satisfied the requirements for jurisdiction under 42 U.S.C. § 405(g). *Id.* at 2466. Since other sources of jurisdiction are foreclosed by § 405(h), this Court is without jurisdiction as to the class members and the conditional certification of the class must be revoked. *Id.*

The parties have filed cross motions for summary judgment. The Social Security Act, § 202(c), codified as 42 U.S.C. § 402(c), authorizes benefits for the husband of an individual entitled to old age benefits if

such husband has applied for old age benefits; is 62 years of age; was receiving at least one-half of his support from his wife as determined by 20 C.F.R. § 404.350 [42 U.S.C. § 402(c)(1)(C)]; and is not entitled to any old age or disability social security benefits of his own. Wives and widows are entitled to benefits on account of their insured husbands pursuant to 42 U.S.C. § 402(b) upon similar grounds except that they need not prove any dependency on their husbands before they may collect. This variance is the crux of the issue presented by these motions for summary judgment.

The reasoning of the Supreme Court in *Weinberger v. Weisenfeld*, 95 S.Ct. 1225 (1975) compels the conclusion that the above mentioned classification is not rationally related to a legitimate governmental interest. *Jablon v. Secretary of Health, Education & Welfare*, 399 F. Supp. 118 (D. Md. 1975); *Silbowitz v. Secretary*, 397 F. Supp. 862 (S.D. Fla. 1975); *Goldfarb v. Secretary*, 396 F. Supp. 308 (E.D.N.Y. 1975); and *Coffin v. Secretary*, Civil No. 1890-73 (D.D.C. filed July 14, 1975) are all cases which have considered the same issue presented herein. In each one, § 402(c)(1)(C) was held unconstitutional on equal protection grounds upon the authority of *Weisenfeld*.

This Court finds the opinion of Judge Kaufman in the *Jablon* case, *supra*, to be thorough and exhaustive as to the constitutionality, or not, of § 402(c). This Court will thus adopt Judge Kaufman's opinion as the basis for its holding that § 402(c)(1)(C) is unconstitutional in that it denies equal protection. *Weisenfeld, supra*. The Court will thus order, as have the other courts ordered in the cases cited above, that the Social Security Act be interpreted and enforced without reference to the dependency requirement. The decision of the Secretary as to Mr. Abbott's claim is

reversed and the cause is remanded to the Secretary with the direction to process and grant the claim in the light of this opinion.

Since Mr. Abbott's claim has been found to be meritorious, the Court finds that Mrs. Abbott can no longer argue that she is being discriminated against. Therefore, the Court need not resolve the standing issue as to Mrs. Abbott or reach the merits of the constitutional attack she has made herein.

For the reasons stated herein, good cause therefor appearing, it is

ORDERED that the motion of plaintiffs for the appearance by law students should be, and the same hereby is, granted, and it is

FURTHER ORDERED that the motion of the defendant to revoke the conditional certification of the class should be, and the same hereby is, granted and the conditional class hereby is revoked, and it is

FURTHER ORDERED that the motion of defendant to dismiss Mildred Abbott as a party plaintiff should be, and the same hereby is, dismissed as moot, and it is

FURTHER ORDERED that the motion of defendant for summary judgment should be, and the same hereby is, overruled, and it is

FURTHER ORDERED that motion of plaintiffs for summary judgment should be, and the same hereby is, sustained, and the clerk shall enter judgment in accordance herein, and it is

FURTHER ORDERED that the decision of the Secretary with respect to the claim for benefits by Mr. Abbott should be, and same hereby is, REVERSED and the case REMANDED to the Secretary with the direction to process and grant the claim in light of this opinion, and it is

FURTHER ORDERED that leave will be granted to all parties to file their supplemental briefs in support of their various motions and the clerk shall file all previously lodged briefs.

IT IS SO ORDERED.

/s/ DON J. YOUNG,
United States District Judge.

Toledo, Ohio.
February 11, 1976.
A true copy.
Attest:

MARK SCHLECHET,
Clerk.

By: BEATRICE L. REIHING,
Deputy Clerk.

APPENDIX B

FILED FEB. 13, 1976

*United States District Court for the Northern District
of Ohio, Western Division*

CIVIL ACTION FILE NO. C 74-194

GEORGE AND MILDRED ABBOTT,

vs.

CASPAR WEINBERGER, SECRETARY HEALTH, EDUCATION
AND WELFARE.

JUDGMENT

This action came on for (hearing) before the Court, Honorable Don J. Young, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged, THAT the motion for summary judgment is hereby sustained and judgment entered in favor of plaintiff George Abbott against the defendant Caspar Weinberger, Secretary, for the reason that this Court finds 42 U.S.C. § 402(c)(1)(C) to be unconstitutional in that it denies equal protection.

Therefore, the decision of the Secretary with respect to the claim for benefits by George Abbott is REVERSED and the case REMANDED to the Secretary

(10)

with the direction to process and grant the claim in light of this opinion.

Plaintiff Mildred Abbott is hereby dismissed as a party plaintiff.

IT IS SO ORDERED.

/s/ DON J. YOUNG

United States District Judge

Dated at Toledo, Ohio, this 13th day of FEBRUARY, 1976.

/s/ MARK SCHLACHET, *Clerk*

Clerk of Court

by /s/ BEATRICE L. REIHING,

Deputy Clerk

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APPENDIX C

FILED MAR. 12, 1976

*In the United States District Court for the Northern
District of Ohio Western Division*

CIVIL NO. C 74-194

GEORGE AND MILDRED ABBOTT, PLAINTIFFS,

v.

CASPAR WEINBERGER, NOW DAVID MATHEWS,
SECRETARY OF HEALTH, EDUCATION AND WELFARE,
DEFENDANT.

NOTICE OF APPEAL

Notice is hereby given that the defendant hereby
appeals to the Supreme Court of the United States,
pursuant to Title 28 United States Code, Section
1252, from the Judgment of the District Court en-
tered in this action on February 13, 1976.

DAVID MATHEWS,

Secretary of Health, Education, and Welfare

UNITED STATES OF AMERICA,

FREDERICK M. COLEMAN

United States Attorney

/s/ PATRICK J. FOLEY

Assistant United States Attorney

307 U.S. Courthouse

Toledo, Ohio 43624

Attorney for Defendant.

(12)

DATED: March 12, 1976.

I hereby certify that this instrument is a true and
correct copy of the original on file in my office.

Attest:

MARK SCHLACHET,

Clerk.

By: MARGARET B. LEWIS,

Deputy Clerk.

APPENDIX D

Pertinent provisions of Title II of the Social Security Act are as follows:

Section 202(c), 42 U.S.C. 402(c):

(c)(1) The husband (as defined in section 216(f)) of an individual entitled to old-age or disability insurance benefits, if such husband—

(A) has filed application for husband's insurance benefits,

(B) has attained age 62,

(C) was receiving at least one-half of his support * * * from such individual [at the time she became entitled to old age benefits]—

* * * * *

and filed proof of such support within two years after the month in which she filed application with respect to such period of disability or after the month in which she became entitled to such benefits, as the case may be, or, if she did not have such a period, two years after the month in which she became entitled to such benefits,
* * *

(D) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary amount of his wife,

shall be entitled to a husband's insurance benefit
* * *

Section 202(f), 42 U.S.C. 402(f):

(f)(1) The widower * * * of an individual who died a fully insured individual, if such widower—

(A) has not remarried, * * *

(B)(i) has attained age 62 * * *

(C) has filed application for widower's insurance benefits or was entitled to husband's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which she died,

(D)(i) was receiving at least one-half of his support * * * from such individual at the time of her death * * *

(E) is not entitled to old-age insurance benefits or is entitled to old-age insurance benefits each of which is less than 82½ percent of the primary insurance amount of his deceased wife,

shall be entitled to a widower's insurance benefit
* * *